1983

Baltazar Antillon v. The Board of Review of The Industrial Commission of Utah, Supreme Court Department of Employment Security : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

BALTAZAR ANTILLON, Plaintiff/Appellant, vs. THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, Defendant/Respondent.	*	Supreme Court No. 19338

BRIEF OF APPELLANT

AN APPEAL FROM A DECISION OF THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION, DEPARTMENT OF EMPLOYMENT SECURITY, TERMINATING APPELLANT'S UNEMPLOYMENT COMPENSATION.

UTAH LEGAL SERVICES, INC.
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STATEMENT OF THE NATURE OF THE CASE

Petition for Writ of Review was granted to appeal the decision of the Board of Review of the Industrial Commission of Utah, which terminated and denied the Appellant unemployment benefits based on §§35-4-5(e) and 35-4-5(k)(1), Utah Code Ann. (1981 Supplement).

DISPOSITION OF THE CASE BELOW

Appellant's benefits were terminated December 25, 1982. A hearing was held before a Department Representative on February 23, 1983. The Representative sustained the termination of benefits in a decision issued March 15, 1983, which allowed the Appellant 10 days to appeal.

Appellant filed his appeal March 22, 1983, and an administrative hearing was held before Eugene D. Wright, Appeals Referee in Price, Utah, April 12, 1983. The Appeals Referee

affirmed the decision of the Department representative who specifically found the Appellant ineligible for benefits based on §35-4-5(e) and §35-4-5(k)(1), Utah Code Ann. (1981 Supplement).

The Appellant appealed the decision to the Board of Review on April 28, 1983. The Board of Review affirmed the decision of the Appeals Referee in a decision dated July 12, 1983. The Appellant then filed a timely Petition for Writ of Review in this Court on July 26, 1983.

RELIEF SOUGHT ON APPEAL

Appellant requests reversal of the decision of the Board of Review of the Industrial Commission of Utah, Department of Employment Security, terminating his benefits and finding him ineligible. Appellant also requests reinstatement of those benefits.

STATEMENT OF FACTS

The Appellant, Baltazar Antillon, is a citizen of Mexico. He has permanently resided in the United States since 1971 (R. 0034), with brief vacations to Mexico. It was on the last of these vacations to Mexico, in July of 1980 that Mr. Antillon filed papers in Mexico to legitimize his status in the United States (R. 0035, 0037). On January 30, 1981, the Appellant voluntarily went to the Immigration and Naturalization Service (INS) in Salt Lake City to determine his immigrant status in the United States (R. 0033). At that time he was issued an I-94 Arrival and Departure document which indicated that he was in the United States with the knowledge of the INS, and under docket control by the Salt Lake INS office (R. 0057). Appellant

was also issued a Notice of Voluntary Departure (R. 0056) pursuant to 8 C.F.R. §245.5(2)(iii), which provided no penalty for failure to depart (R. 0033).

Instead of leaving the United States, Appellant remained in the country in an attempt to legitimize his status to that of legal permanent resident. He hired an immigration attorney who informed him that he was entitled to apply for Suspension of Deportation (§3244 Immigration and Nationality Act, 8 U.S.C. §1254) and, through that process, become a legal permanent resident of the United States. The Appellant notified the INS of his intention to remain in the United States pending final adjudication of his status by filing an Application for Suspension of Deportation on August 4, 1981 (R. 0054, 0055). Subsequent to the filing of this application, the INS issued an Order to Show Cause (R. 0051) against the Appellant on September 10, 1981, which initiated deportation proceedings (8 C.F.R. §242.1). The Order to Show Cause informed the Appellant of his procedural due process rights and set a date for the hearing, on the veracity of the allegations, on a "date to be determined." (R. 0052, 0051).

Appellant testified that no action by the INS had occurred subsequent to the fall of 1981 (R. 0039). He has not had a hearing before an immigration judge (R. 0038) nor has any action been taken on his application for Suspension of Deportation (R. 0039).

After applying for papers in Mexico, informing the INS of his presence in the United States and receiving an I-94

document, the Appellant believed that there had been a change in his status in the United States which made him eligible for benefits (R. 0037). Prior to his contact with the INS, Appellant understood he was not entitled to benefits and therefore, he never applied, even though he had had periods of unemployment (R. 0037).

Appellant applied for and received unemployment compensation benefits for the weeks ended January 10, 1981, through January 31, 1981, and from July 17, 1982, to July 24, 1982; October 30, 1982, through December 25, 1982. His benefits were terminated on December 25, 1982. At his hearing on April 12, 1983, the Appellant objected to the use of, and reliance on, the hearsay evidence of the INS (R. 0029, 0030). His objection was overruled (R. 0030), and he was subsequently disqualified for 49 week period beginning March 20, 1983, and ending February 25, 1984, and found to have received an overpayment liability in the amount of $4,220.00, twice the amount he received (R. 0004).

ARGUMENT

POINT I.

APPELLANT ESTABLISHED HIS ELIGIBILITY FOR UNEMPLOYMENT BENEFITS UNDER SECTION 35-4-5(k), UTAH CODE ANNOTATED (1981 SUPPLEMENT), AS A PERSON PERMANENTLY RESIDING IN THE UNITED STATES UNDER COLOR OF LAW.

A. UTAH CODE ANN. §35-4-5(k) PROVIDES THREE CATEGORIES OF ALIENS ELIGIBLE TO RECEIVE UNEMPLOYMENT COMPENSATION BENEFITS.

The Appellant was found to be ineligible under §35-4-5(k), Utah Code Ann. (1981 Supplement) which provides that:

> An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

> (k)(1) For any week in which the benefits are based upon services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services or, was permanently residing in the United States under color of law at the time such services were performed (including an alien who is lawfully present in the United States as a result of the application of the provision of section 203(a)(7) or section 212 (d)(5) of the Immigration and Nationality Act).

(Emphasis added). The statute establishes three distinct exceptions to ineligibility. Respondents, in their decision in this case acknowledge eligibility based only on the first two categories: when an alien is lawfully admitted for permanent residence or lawfully admitted for performing the services (as demonstrated by a work authorization permit issued by the INS). The third and completely ignored category includes those aliens "permanently residing in the United States under color of law."

The meaning of the phrase "permanently residing in the United States under color of law" must be examined in terms of case law and the Immigration and Naturalization Act. Since the Utah statute is identical to Federal law, 26 U.S.C. §3304(14)(A), and neither attempts to limit the phrase "under color of law," it should be accorded a fluid meaning consistent with its historical legal significance with an eye toward the relationship of the alien and his status in the United States.

The starting point for analysis is examining the meaning of "color of law". It has frequently been said that

color of law does not mean actual law. "'Color' as a modifier legal parlance means 'appearance as distinguished from reality Color of law means mere semblance of legal right." McCain City of Des Moines, 174 U.S. 168, 175 (1889).

B. WHEN THE IMMIGRATION AND NATURALIZATION SERVICE IS AWARE OF A PERSON'S STATUS AND DOES NOT ATTEMPT TO EFFECTUATE DEPORTATION, THAT PERSON IS RESIDING IN THE UNITED STATES UNDER COLOR OF LAW.

In Holley v. Lavine, 553 F.2d 845 (2nd Cir. 1977 cert. denied Shang v. U.S., 435 U.S. 947 (1978) the cour construed the phrase "permanently residing in the United State under color of law" which was used in the eligibility criteria of the New York State Aid to Families with Dependent Children (AFDC plan. In construing "under color of law" the court stated:

> The phrase obviously includes actions not covered by specific authorization of law. It embraces not only situations within the body of the law, but also others enfolded by a colorable invitation. "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or legislative body uses the phrase "under color of law" it deliberately sanctions the use of cases that are, in strict terms, outside the law, but are near the boarder.

Id. at 849-950. See also Matter of Papadopoulos v. Shang, N.Y.S.2d 152, 155 (1979); St. Francis Hospital v. D'Elia, N.Y.S.2d 104, 109 (1979).

In Berger v. Department of Health Education and Welfare, Civil Action No. 76 C 1420 (1978), the Federal District Court for the Eastern District of New York gave its approval to a consent judgment regarding eligibility for Supplemental Security Income benefits which included as persons permanently residing in the United States under color of law "any alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and whose departure from the United States the Immigration and Naturalization Service does not contemplate enforcing." (Final judgment attached as Appendix 1).

The court in Papadopoulos, supra, determined that the petitioner was in the United States under color of law while her application for adjustment of status was pending before the Immigration and Naturalization Service. In Papadopoulos, the petitioner entered the United States on a non-immigrant visa on August 16, 1975, and 12 days later she applied to the INS for a change of status to that of permanent resident. She had a stroke February 2, 1976, while her application before the INS was still pending. Applications for nursing home care were approved in May 1976 and June 1976. Her application before the INS was denied on December 15, 1976, and the denial was on review at the time the court heard the case. The court determined that denial of Medicaid was inappropriate since the petitioner was in the United States "under color of law" during any "period subsequent to the final denial of her application for adjustment of status to permanent resident and while she was awaiting a ruling on whether

or not she would be granted deferred status for humanitarian reasons." Id. at 155 (Emphasis added).

In the present case, the standards of Holley as applied in Papadopoulos support a finding that the Appellant is and was, at the time he filed and received unemployment compensation benefits, permanently residing in the United States under color of law within the meaning of §35-4-5(k). As in Papadopoulos, the Appellant in this case voluntarily contacted the INS to attain an adjustment of status to permanent resident. When he contacted the INS they issued an I-94 form, an identification form issued pursuant to 8 C.F.R. §264.1. This form identifies the alien as a person who is under docket control of the INS. Aliens are required to carry this documentation at all times. Failure to have those documents is a punishable offense under 8 U.S.C. §1304(e).

Appellant rightfully understood this as a change from his previous status in the United States (R. 0037). He continued to keep the INS informed of his presence in the United States and has not been deported. In fact, he did not hear from the INS again until after he filed for Suspension of Deportation in August of 1981 (R. 0055). Then on September 10, 1981, an Order to Show Cause alleging a basis for deportation was issued (R. 0051). The veracity of these allegations has never been proven by the INS in a deportation hearing. The Appellant remains in the United States with the knowledge and permission of the INS until these allegations are proven and his Application for Suspension of Deportation is finally denied or granted.[1] Thus,

the Appellant is in the same condition that Mrs. Papadopoulos was while she was waiting for the INS to act on her application. As the court noted there she was "under color of law pending a final denial of her applications and deferred status."

The relief that Appellant seeks under the Immigration and Nationality Act, in the form of Suspension of Deportation, is similar in nature to the relief which was sought in Papadopoulos.[2] Throughout the period of his dealings with the INS, no efforts beyond the initiation of deportation proceedings through the issuance of an Order to Show Cause have been made by the INS to effect a final deportation. The hearing date to determine the veracity of these allegations is still to be set on a "date to be determined." (R. 0051) All of this impels the conclusion that Baltazar Antillon is "permanently residing in the United States under color of law" and thus, is entitled to unemployment compensation benefits under §35-4-5(k)(1), Utah Code Ann. (1981 Supplement).

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[1] The right of an individual to remain in the United States pending final adjudication of his status is indicated by 8 U.S.C.A. §1252(e) (1983 Supplement) which penalizes an alien for failure to depart the country "within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court...."

[2] Suspension of Deportation is a discretionary form of relief from deportation under the Immigration laws, 8 U.S.C.A. §1254. This form of relief is also recognized in 8 U.S.C.A. §1252(e)(6), as relief which a court could recognize to allow an alien to remain in the United States.

C. A RELATIONSHIP MAY BE PERMANENT EVEN THOUGH IT IS ONE THAT MAY BE CHANGED EVENTUALLY AT THE INSTANCE OF EITHER THE UNITED STATES OR THE INDIVIDUAL.

Since in the phrase "permanently residing in the United States under color of law" reference is being made to an alien's immigration status, the definition found in the Immigration and Nationality Act is helpful in explaining the meaning of the terms. In regards to the word "permanent" the Immigration and Nationality Act states in 8 U.S.C. §1101(a)(31):

> The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance of either the United States or of the individual, in accordance with law.

See also: Holley v. Lavine, supra, at 850.

The statutory definition of the adjective "permanent" aids in the interpretation of the adverb "permanently" when construing the phrase "permanently residing in the United States under color of law".

Moreover, the above federal statutory definition is consistent with categories of persons qualifying as "permanently residing...under color of law" in §35-4-5(k). For example, under 8 U.S.C. §1153(a)(7), a refugee is only permitted conditional entry pursuant to regulations of the Attorney General, while under 8 U.S.C. §1182, an alien may be paroled temporarily into the United States at the direction of the Attorney General even though they are otherwise inadmissible. Thus, the two examples

are instances where an alien is permitted to stay in the United States not necessarily forever, but only so long as he/she is in a particular condition, Holley v. Lavine, supra at 851. While in that particular condition the alien is permanently residing in the United States.

The Appellant in this case has an ongoing relationship with the INS in which he is attempting to legitimize his immigrant status to that of legal permanent resident through Suspension of Deportation. So long as INS allows him to reside in the United States to pursue his claim to permanent residency, he should be recognized as a person permanently residing in the United States under color of law.

POINT II.

APPELLANT WAS ENTITLED TO BENEFITS SINCE THE EVIDENCE PRESENTED WAS INSUFFICIENT TO TERMINATE HIS UNEMPLOYMENT BENEFITS.

A. THE DECISION WAS NOT SUPPORTED BY A PREPONDERANCE OF EVIDENCE.

Regardless of whether or not Appellant is found to be residing in the United States under color of law, he is nonetheless entitled to the benefits that he has received since the Respondents failed to demonstrate, by a preponderance of the evidence, that Appellant was an ineligible alien at the time he filed for and received unemployment compensation benefits. The disqualification provisions of §35-4-5(k)(3) specifically provide that:

> (3) In the case of an individual whose application for benefits would otherwise be approved, no determination that

> benefits to such individual are not payable because of his alien status shall be made except upon a preponderance of the evidence.

(Emphasis added). This requires the Respondent to demonstrate that a preponderance of the evidence substantiates ineligibility at the time the claim for benefits was made. In the present case, there is nothing in the record that substantiate a determination of ineligibility at the time Appellant applied for and received unemployment benefits. The evidence, which is totally hearsay, establishes questions about the Appellant's status prior to filing for unemployment benefits, but it does not support a factual finding of illegal status at the time he applied for benefits. The testimony of the Appellant establishes that he is a citizen of Mexico. This in and of itself is not sufficient to disqualify the Appellant or demonstrate that when he applied for unemployment benefits he was an ineligible alien.

B. HEARSAY ALONE IS INSUFFICIENT TO JUSTIFY THE DECISION OF THE BOARD OF REVIEW.

The Respondents base their denial of benefits solely on the hearsay evidence provided by the Immigration and Naturalization Service. In Sandy State Bank v. Brimhall, 636 P.2d 481 at 486 (Utah 1981), this Court stated the rule regarding use of hearsay in administrative proceedings:

> The Court has long recognized the considerable differences that exist between court trials and proceedings before administrative agencies, and that the technical rules of evidence need not be applied in the latter. The Court has also held that hearsay evidence

> is admissible in proceedings before the Industrial Commission and the Public Service Commission. However, a finding of fact cannot be based solely on hearsay evidence, but must be supported by a residuum of legal evidence competent in a court of law.

(Footnotes omitted, emphasis added). See also: Ogden Iron Works v. Industrial Commission, 702 Utah 492, 132 P.2d 376, 379 (1942).

The decision of the Respondents in the present case was based solely upon the hearsay statements of the INS. The Respondents relied upon documents of the INS which were admitted over objection by the Appellant (R. 0029, 0030), as being hearsay. The Appeals Referee acknowledged the existence of hearsay, but overruled the objection and admitted the evidence (R. 0030).

The prejudicial effect of relying solely on the hearsay evidence in the present case is demonstrated by the void in the record created due Appellant's lack of opportunity to confront the INS about the relevance of the various documents in establishing Appellant's immigration status in the United States. One document relied upon by the Department Representative (R. 0039) blatantly states that the Appellant is in the country "illegally" without stating why or under what law the determination was made. Furthermore, the documents of the INS failed to establish the qualifications of the individuals making statements of the Appellant's status in the country.

The Respondents cannot base their decision solely on the prior decision of the Department. The Board of Review must

examine the record and find competent evidence support findings of fact. Philadelphia Transportation Company v. Unemployment Compensation Board of Review, 196 Pa.Super. 1 (1958). The record in this case does not support the existen of even a "residuum of legal evidence" which would be "competen in a court of law. Thus, the Respondent's decision cannot stan since it is not supported by competent evidence nor substantiate by a preponderance of evidence. The only evidence produced b the Respondent in support of its decision was the hearsa document of Mr. Donald Whitney (R. 0049) and the Order to Sho Cause (R. 0051) which merely alleges that the Appellant i illegally present in the United States. The function of an Orde to Show Cause was spelled out in Chlomos v. U.S. Dept. of Justic Immigration and Naturalization Service, 516 F.2d 310, 312 FN. (1975) which stated:

> 1. An order to show cause should contain a concise statement of the violation and a designation of the charges against the alien. It is comparable to an indictment in a criminal proceeding or a complaint in a civil action. See 1 Gordon and Rosenfield, Immigration Law and Procedure, §5.5 et seq. (Rev.ed. 1974).

The Appeals Referee stated that in regard to th Appellant's immigration status: "As near as I can determine everything in this case is pending." This is the only clea finding of fact which is supported by the testimony evide presented at the Appellant's hearing. For these reasons, th decision of the Board of Review should be reversed an Appellant's unemployment benefits should be reinstated.

POINT III.

THE APPELLANT DID NOT WILLFULLY OR KNOWINGLY ATTEMPT TO OBTAIN UNEMPLOYMENT BENEFITS HE WAS NOT ENTITLED TO.

If this Court should find that the Appellant is not permanently residing in the United States under color of law within the meaning of the unemployment statute, and that the decision of the Board of Review is substantiated by a residuum of legally competent evidence, it will be necessary to determine whether the Appellant willfully made a false statement in order to obtain benefits he was not entitled to. The Appellant was found to be ineligible for benefits based on §35-4-5(k) and §35-4-5(e), Utah Code Ann. (1981 Supplement). Section 35-4-5(e) provides in relevant part:

> An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> (e) For each week with respect to which the claimant willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under the provisions of this act, and an additional 13 weeks for the first week the statement or representation was made or fact withheld and six weeks for each week thereafter; such additional weeks not to exceed 49 weeks....
>
> Determinations under this subsection shall be made only upon a sworn written admission of the claimant or after due notice and recorded hearing. If a claimant waives the recorded hearing a determination shall be made based upon all the facts which the commission, exercising due diligence, has obtained. Determin-

> ations by the commission shall be appealable in the manner provided by this act for appeals from other benefit determinations. (emphasis added)

In Taylor v. Department of Employment Security, 6[illegible] P.2d 1, 2 (Utah 1982), this Court affirmed the position of Mineer v. Board of Review, 572 P.2d 1364, 1366 (Utah 1977) which stated:

> The intention to defraud is shown by the [unemployment] claims themselves which contain false statements and fail to set forth material facts required by statute. The filing of such claims evidences a purpose or willingness to present a false claim in order to obtain unlawful benefits and hence are manifestations of intent to defraud.

Applying this standard to the facts of the present case there must be a distinction between supplying incorrect factual information and understanding a nebulous legal concept. For in Taylor and Mineer the claimants were citizens of the United States who knew and understood the applications that they were filling out. In contrast, in this case the Appellant is a Mexican citizen who speaks, reads and writes English as a second language. "Willful," for purposes of obtaining unemployment benefits, has been defined as knowingly making a false statement. Petty v. Commissioner of Labor, 456 N.Y.S.2d 181 (App.Div. 1982). In Ault v. Unemployment Compensation Board of Review, 398 Pa. 250, 157 A.2d 375 (1960), the court made it clear that the appellant was entitled to the presumption of innocence set forth by the U.S. Supreme Court in Slochower v. Board of Higher

Education, 350 U.S. 551 (1956). This presumption must be overcome by more than mere "suspicion and imputation." Id. at 554. As applied to the present case, this means that the Appellant cannot be found to have made a false or willful misrepresentation without a demonstration that the Appellant answered questions in a manner which he knew to be incorrect and for the sole purpose of obtaining benefits to which he was not entitled.

Case law establishes that a claimant cannot be said to have made a willfully false statement where that statement was made "accidentally because of negligence, misunderstanding, or other cause." Meyer v. Skyline Mobile Homes, 589 P.2d 89 (Idaho 1979) (Emphasis added). See also United States v. Steinhilber, 484 F.2d 386 (8th Cir. 1973). The only evidence presented was the testimony of the Appellant in which he stated that he that he understood the question, "Are you a United States Citizen? Yes - No" to mean do you have a right to be in the United States. (R. 0038). His testimony was that he:

> ..."didn't check 'no' because I had my papers through the Immigration Service, and they didn't say I was -- what if I were not.... I (was) [sic] believed that I was allowed to -- to get benefits."

The good faith belief of the Appellant, and his minimal understanding of the forms which he was filling out distinguishes this case from other Utah cases which summarily find an error on the claim card to be fraud. This misunderstanding of the question and Appellant's response is further supported by the

fact that the Appellant never applied for benefits prior establishing contact with the INS in an attempt to clarify status even though he had been unemployed (R. 0037).

The record indicates a misunderstanding on the part of the Appellant, but does not support a willful or fraudulent intent in his actions. The Appellant admits that upon discovery of the alleged overpayment he realized that he had improperly filled out the form. But at the time he filled out the papers, he thought his filing of Immigration papers made it wrong for him to say that he wasn't a citizen. In his mind "no" did not apply because he had his "papers through the Immigration and Naturalization Service." Seen in this light as applied to this Appellant, the requisite state of mind with the purpose of obtaining benefits to which he was not entitled does not exist. Therefore, if this Court should find the Appellant ineligible, he should only be required to repay those sums to which he was not entitled. He should not be required to pay twice the amount or be penalized for 49 weeks.

CONCLUSION

The Appellant raises three basis upon which the decision of the Respondent should be reversed. First, that he is entitled to benefits under the third category of aliens eligible to receive unemployment benefits, aliens "under color of law" which was ignored by the Board of Review. This eligibility makes the technical statement of citizenship a non-material issue and justifies reversal and reinstatement of Appellant's unemployment benefits.

Second, should Appellant not be found within the color of law category, the Board of Review nonetheless failed to prove his ineligibility by a preponderance of the evidence. The Board of Review relied upon the decision of the Appeals Referee and failed to determine whether a residuum of legally competent evidence, aside from hearsay supported the finding below.

Finally, if Appellant is found ineligible and the decision is supported by legally competent evidence, the Appellant's maximum liability should be the sum which he received. Since he did not understand that his marking the citizenship box "yes" was incorrect. This action does not support a willful and knowingly false statement to obtain benefits to which he was not entitled.

DATED this 30th day of September 1983.

Respectfully submitted,

UTAH LEGAL SERVICES, INC.
Attorneys for Appellant

By: CECELIA M. ESPENOZA

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two true and correct copies of the foregoing BRIEF OF APPELLANT was mailed first-class postage prepaid to the following:

Floyd G. Astin
K. Allen Zabel
Special Assistant Attorneys General
Attorneys for Respondent
174 Social Hall Avenue
Salt Lake City, Utah 84147

DATED this 30 day of September, 1983.

APPENDIX I

MANNY BERGER

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, AND THE UNITED
STATE OF AMERICA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

DANNY BERGER, on behalf of himself and all others similarly situated,

Plaintiff,

- against -

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE UNITED STATES OF AMERICA,

Defendants.

----------x

Filed
June 13, 1978

CIVIL ACTION
No. 76 C 1420

FINAL JUDGMEN

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FEB 13 '79

Prior to final judicial findings of fact and conclusions of law and prior to the certification of this action as a class action under Rule 23 of the Federal Rules of Civil Procedure, the parties, by their respective attorneys, having presented for judicial approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure the within Stipulation of Consent to the Entry of Judgment; and

This Court having satisfied itself as to the fairness, adequacy and propriety of the proposed Final Judgment;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that without admission or adjudication of law or fact herein, the Stipulation of Consent to the Entry of Judgment annexed hereto is the judgment of this Court.

IT IS STIPULATED AND AGREED by and between the attorneys for the respective parties herein that:

1. Plaintiff Manny Berger, an alien residing in the United States under an order of supervision issued pursuant to 8 U.S.C. §1252(d), is an alien permanently residing in the United States under color of law pursuant to 42 U.S.C. §1382c(a)(1)(B)(ii) and has been determined to be entitled to Supplemental Security Income (SSI) benefits; and the defendant Secretary will continue to provide plaintiff Berger with monthly SSI payments for as long as his immigration status remains that of an alien permanently residing in the United States under color of law and he remains otherwise eligible for benefits.

2. Proposed intervenor Emma Mena, an alien who is the beneficiary of an immediate relative immigrant visa petition and thus has been afforded indefinite voluntary departure by the Immigration and Naturalization Service pursuant to Operations Instruction 242.10(a)(6)(i), is an alien permanently residing in the United States under color of law pursuant to 42 U.S.C. §1382c(a)(1)(B)(ii) since at least December 1, 1978. The defendant Secretary, provided proposed intervenor Mena meets all other eligibility requirements, will provide proposed intervenor Mena with monthly SSI payments for as long as her immigration status remains that of an alien permanently residing in the United States under color or law and she remains otherwise eligible for benefits.

3. Aliens who are permanently residing in the United States under color of law and who may be eligible for Supplemental Security Income benefits include, but are not limited to:

(1) aliens admitted to the United States pursuant to 8 U.S.C. §1153(a)(7); (2) aliens paroled into the United States pursuant to 8 U.S.C. §1182(d)(5); and (3) aliens residing in the United States pursuant to an order of supervisio indefinite stay of deportation or indefinite voluntary departure. Any other alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and whose departure from the United States the Immigration and Naturalization Service does not contemplate enforcing is also permanently residing in the United States under color of law and may be eligible for Supplemental Security Income benefits.

4. Defendant Secretary and his employees and agents 1) maintain that they have in the past made and 2) shall in the future make individualized determinations of all applications by aliens for Supplemental Security Income benefits and, specifically, defendant Secretary and his employees and agents (1) maintain that they have in the past and (2) shall in the future make individualized determinations in all cases as to whether an alien is permanently residing in the United States under color of law pursuant to 42 U.S.C. §1382c(a)((B)(ii), and where it is determined that the alien is ineligible for SSI benefits because he or she is neither lawfully admitted for permanent residence nor otherwise permanently residing in the United States under color of law, the notice denying benefits shall specifically state that the alien is found not to be permanently residing in the United States under color of law.

5. Defendant Secretary and his employees and agents shall take all steps necessary to ensure that this order is carried out by the employees of the Social Security Administration and that all aliens who apply for SSI, who are determined to be permanently residing in the United States under color of law and who are otherwise eligible for Supplemental Security Income are awarded and provided with SSI benefits.

6. Defendant Secretary agrees to promulgate a new notice in cases of denial or suspension of assistance, to be sent to Supplemental Security Income applicants or recipients that is intended to inform the applicant or recipient that the requirements of 42 U.S.C. §1382c(a)(1)(B)(ii) have not been met. These notices are annexed as Exhibits A and B to this stipulation.

7. All recipients of or applicants for Supplemental Security Income benefits who, since August 24, 1976, have received or receive notices which informed or inform them that they were or are ineligible for SSI benefits because they were not United States citizens or legally admitted aliens, but do or did not inform them that their status as aliens permanently residing in the United States under color of law may entitle them to benefits shall be provided with the written notice annexed hereto as Exhibit C.

8. Each of the recipients of or applicants for SSI benefits described in paragraph 7 above shall be entitled, upon request, to a review of the Social Security Administration's previous decision on his or her SSI claim for the purpose of

establishing whether he or she is and has been permanently residing in the United States under color of law. Any determination made pursuant to such review shall be subject to all of the rights granted by the Social Security Act and regulations promulgated thereunder for review of an initial determination. Defendant Secretary and his employees and agents shall pay any such individual who establishes his or her color of law status and is otherwise eligible SSI benefits retroactive to the date of his or her initial application/suspension, or to the date that is established as the time that he or she first met or meets the color of law conditions, whichever date is later.

9. The entry of this judgment shall be without prejudice to the rights of absent class members, if any.

10. The terms of this judgment shall bind the defendant and his successors in office, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise.

11. Nothing contained in this judgment shall constitute an adjudication or concession with respect to the validity, under the Constitution or any federal law or regulation, of any policy, practice or procedure of the defendants.

12. This Court retains jurisdiction over this action for the purpose of issuing any orders which may be necessary for the construction, implementation or enforcement of this judgment or of any of the provisions thereof.

Dated: New York, New York

June 7 1978

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SO ORDERED:

s/ Charles P. Sifton
CHARLES P. SIFTON
United States District Judge

Dated: June 12, 1978
Brooklyn NY.

Judgment entered:

Richard H. Weare
Clerk